

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

BARRY GEWIN,

Petitioner,

v.

**Civil No. 2:07cv65
(Judge Maxwell)**

UNITED STATES OF AMERICA,

Respondent.

**NOTIFICATION TO PETITIONER OF RIGHT TO CONSENT TO
PROCEED UNDER 28 U.S.C. § 2255 OR TO PROCEED AS FILED**

On August 15, 2007, the *pro se* petitioner, Barry Gewin, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241. In addition, he paid the required \$5.00 filing fee.

Title 28, United States Code, Sections 2241 and 2255 each create a mechanism by which a federal prisoner may challenge his detention. However, the two sections are not interchangeable. Section 2255 is the appropriate method for a federal prisoner to challenge his conviction or the imposition of his sentence. Adams v. United States, 372 F.3d 132, 134 (2nd Cir. 2004); see In re Jones, 226 F.3d 328, 332-33 (4th Cir. 2000). Conversely, Section 2241 is the proper method for challenging the execution of a sentence. Adams at 135; see In re Jones, at 332-33. In a § 2241 petition, a prisoner may seek relief from the administration of his parole, computation of his sentence, disciplinary actions taken against him, or the type of detention and conditions in the facility where he is housed. Adams at 135.

The undersigned has made a preliminary review of the petitioner's Application for Habeas Corpus Pursuant to 28 U.S.C. § 2241, and finds that it raises issues normally brought in a § 2255 petition. In addition, review of the docket sheet from the petitioner's conviction in the United States

District Court for the District of Columbia reveals that he has not filed a collateral attack pursuant to § 2255. However, before any motion can be recharacterized as a motion filed pursuant to § 2255, the court is first required to give the defendant notice of its intent to recharacterize the motion, warn him of the effects of such recharacterization, and advise him as to the requirements of § 2255. Id. Petitioner must then be given the opportunity to consent to the recharacterization of his motion, or to proceed as filed. Id.

Upon review of the motion, the undersigned is of the opinion that the petition should be converted to a § 2255 motion and transferred to the United States District Court for the District of Columbia. Thus, the petitioner is hereby notified that the Court intends to characterize his Application for Habeas Corpus pursuant to 28 U.S.C. § 2241, filed on August 15, 2007, as a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255¹ unless it hears to the contrary within TWENTY (20) DAYS from the date of this notice.

In deciding whether to proceed under § 2255, or as filed, petitioner is advised of the following:

1. Only one (1) § 2255 motion is permitted to be filed.
2. A second or successive motion can only be filed if certified by the United States Court of Appeals to contain newly discovered evidence or a new rule of constitutional law , made retroactive to cases on collateral review by the Supreme Court.
3. There is a one-year limitation period within which to file a § 2255 federal habeas

¹ Section 2255 provides that “[a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.”

corpus petition. A motion filed under 28 U.S.C. § 2255 must be filed within one year of the latest of:

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255.

Moreover, the Court has attached an election form to facilitate the processing of petitioners' wishes in this matter. Petitioner should return the completed form to the Court within **twenty (20) days** of the date of this notice. **The failure to do so will result in the Petition for Habeas Corpus Pursuant to 28 U.S.C. § 2241 being converted to one filed pursuant to 28 U.S.C. § 2255.**

IT IS SO ORDERED.

The Clerk is directed to mail a copy of this Order and election form to the petitioner by certified mail, return receipt requested.

DATED: August 20, 2007

/s/ James E. Seibert
JAMES E. SEIBERT
UNITED STATES MAGISTRATE JUDGE

**IN THE UNITED STATES DISTRICT COURT
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BARRY GEWIN,

Petitioner,

v.

**Civil No. 2:07cv65
(Judge Maxwell)**

WAYNE A. PHILLIPS, WARDEN,

Respondent.

**ELECTION BY PETITIONER TO PROCEED
UNDER 28 U.S.C. § 2255 OR TO PROCEED AS FILED**

I have received and reviewed a copy of the Court's Notification to Petitioner of Right to Consent to Proceed Under 28 U.S.C. § 2255 or to Proceed as Filed. Pursuant to that Notice, I elect to proceed as follows:

Please check one of the following:

- I elect to have my Application for Habeas Corpus Pursuant to 28 U.S.C. § 2241, filed on August 15, 2007, converted to a motion filed pursuant to 28 U.S.C. § 2255 and understand that the matter will be transferred to the United States District Court for the District of Columbia..
- I elect to withdraw my Application for Habeas Corpus Pursuant to 28 U.S.C. § 2241 and will file my own separate motion pursuant to 28 U.S.C. § 2255 in the United States District Court for the District of Columbia.
- I elect to proceed on my petition as filed. If this box is checked, I understand that the Court will not convert my motion to one filed under 28 U.S.C. § 2255.

Signature

Date